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No. 05-37 & 05-45

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PETER DECENA, *et al.*,

Petitioners,

-and-

ROBERT LINDERMAN,

Petitioner,

v.

THE SAN JOSE CHARTER OF THE HELLS ANGELS MOTORCYCLE CLUB, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the lower courts err in denying qualified immunity to Sergeant Robert Linderman, who instructed other officers executing search warrants he had obtained for Respondents' homes and clubhouse to seize "everything" constituting "Hells Angels indicia", when he knew that the sole purpose of the evidence was to prove that the Hells Angels is an ongoing organization of three or more, an element of a sentencing enhancement that was charged against a third party, resulting in the unnecessary seizure and destruction of "truckloads" of Respondents' property?

(2) Did the lower courts err in denying qualified immunity to Officers Peter Decena, William Newman, William Manion, Michael Knox, Robert Carney, Paul Messier, and Rafael Nieves, who were given a week to plan the execution of the search warrants, and learned that Respondents James Souza and Lori and Robert Vieira had large dogs in their yards, but failed to make any realistic plan to avoid shooting and killing the dogs?

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STATEMENT OF THE CASE

The Ninth Circuit's opinion accurately states the extraordinary facts of this case, with the minor exception that *none* of the evidence seized from Respondents was introduced as evidence.[1] Below, we provide additional facts that fully rebut Petitioners' arguments in favor of review. All are part of the appellate record and record cites were provided in the Consolidated Answering Brief of Appellees, filed in the Ninth Circuit on April 17, 2003.

I. Petitioner Linderman Knowingly Exceeded The Scope Of The Warrants

Sergeant Linderman drafted, signed and submitted the affidavits in support of the search warrants, as well as the warrant forms. He personally delivered these materials to a judge, who spoke to him, and then signed the warrant forms.

Linderman knew that none of Respondents was accused of a crime. He knew that the sole reason for seizing Hells Angels indicia from Respondents' homes and clubhouse was to support a sentencing enhancement charged against a third party. "[I]t was evidence towards the gang enhancement. That's what it was being seized for," Linderman confirmed during his deposition. He knew that the evidence was relevant only to prove that the Hells Angels Motorcycle Club is an ongoing organization of three or more having a common name or common identifying sign or symbol, a fact that was never in dispute.

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1. The Opinion states "the prosecution only presented a few seized photographs at Tausan's trial." Linderman's Appendix ("App.") 19. In fact, the photographs presented were not seized from Respondents, but were part of the generic collection of a San Jose Police Officer called as a Hells Angels "expert" by the prosecution.

Linderman instructed the entry and search teams how to conduct the searches before they began. He also spoke to search team leaders by phone during the searches. Several called Linderman and asked him what they should do when they saw that virtually everything Respondents own is Hells Angels "indicia," and that jack hammers would have to be used to seize some of it and trucks would have to be called to transport it if they took it all. "Take everything," search team leader Deputy Faler testified Linderman told them. *See also* deposition testimony of Deputy St. Denis, Deputy Pennington, Deputy Bacon, Deputy LeBadour, Deputy Greer, and Deputy Tomlinson.

As a result of Sergeant Linderman's direct and repeated order to do so, the search teams seized so much "Hells Angels indicia" that they could not even fit it into their normal evidence room, and were forced to rent offsite storage. In addition to the damage caused by the seizures, Respondents' property was damaged and destroyed in the process of transportation and storage, and they were deprived of its use for months. Yet not one item was introduced as evidence in the proceeding against the third party, Steve Tausan.

Even after Mr. Tausan's acquittal, Linderman and Santa Clara County refused to release Respondents' property, requiring that Respondents hire attorneys and file motions in court, which took another six months to resolve.

II. Petitioners Decena, Newman, Manion, Knox, Carney, Messier and Nieves Made No Effort, Despite The Week They Had To Plan The Raids, To Avoid Killing Respondents' Dogs

Petitioners Decena, Newman, Manion, Knox, Carney, Messier, and Nieves ("the Officers"), who were given a week to plan for the execution of the search warrants, were responsible for shooting and killing Respondents' dogs in the course thereof.

A. The Shooting Of Respondent Souza's Dog

The Officers' plan for dealing with James Souza's dog consisted of two possible options: isolate the dog or shoot it. The Officers had no intention of giving Mr. Souza the opportunity to isolate his dog. Nor did they have a plan as to how to do so themselves.

On the day of the raid, receiving no answer to their knock on the front door (as the Souzas were out of town), the team broke down the door. The team assigned to go through the side gate was unable to cut the lock on the gate, and never sought the cooperation of the neighbor with whom Mr. Souza shared the gate. While they were struggling with the lock, the Officers were approached by the neighbor , who stated, "I'll take care of the dog," or "I'll deal with the dog," but the Officers "opted not to utilize her." Instead, after entering the backyard through the house, two of the Officers proceeded to "patrol[] the yard . . . looking out for the rottweiler" with their firearms drawn, find it, and shoot it in the head with an MP-5 assault rifle twice.

B. The Shooting Of Respondents Lori And Robert Vieira's Dogs

The plan for dealing with the Vieiras' dogs amounted to (1) hoping that what the Officers called "guard dogs" would not appear when the Officers broke the lock on the Vieiras' gate and entered their yard; (2) poking at the dogs through the fence with a shotgun to try to scare them away; and then, if the dogs did not immediately retreat, (3) shooting them.

The Officers had no intention of giving the Vieiras the opportunity to comply with the warrant and avoid the destruction of their pets. Rather, the Officers planned to maintain the "element of surprise" by cutting the lock on the outer fence, approaching the house, and only then alerting the Vieiras to their presence. This plan, of course, ignored the near certainty that the Officers would have to "engage" the dogs, resulting in shot-gun blasts that would alert the Vieiras to their presence while the officers were still outside the fence.

And that is precisely what happened. When the Officers approached the Vieiras' fence, the dogs began to bark. When an Officer poked at the dogs through the fence with his shotgun, the dogs did not retreat. When the Officers stuck their hands through the fence to cut the lock, the dogs snapped at their hands. Officer Nieves aimed his shotgun and fired at one of the dogs.

When Mr. Vieira appeared on his balcony in his underwear, having been aroused by the shot, "[h]e was instructed to stay where he was." According to one of the Officers, "tactically, it would not have been proper to allow him to come outside and get the dogs." (The "tactic" referenced was never explained.) So, before the team went

through the gate, Officer Nieves shot a second dog twice, critically wounding it. When the team began to enter the yard, the first dog tried to get up, so Nieves fired a fourth shot into its head, killing the helpless dog.

C. Non-Lethal Alternatives Available

Petitioners and other San Jose Police Officers confirmed during their depositions that it is the policy and practice of the San Jose Police Department to try to avoid shooting animals if at all possible. The Officers testified that there are many ways to avoid shooting dogs, some of which, including the following, they had used successfully in the past:

1. Allowing The Dog's Owner Or Caretaker To Control The Dog

According to Officer Manion:

> San Jose Police Officers try to avoid shooting animals if at all possible. . . . For example, if the dog cowered or moved away or if the dog's owner was present to put the dog into a room, it would not be necessary to shoot the dog.

See also Officer Fernandez (Q: "Have you also participated in search warrant executions where the owners or residents of the home corralled the dogs and got them out of your way? A: That's our first choice, yes.").

When Mr. Souza's neighbor entreated the Officers to let her "take care of [his] dog," the Officers "opted not to utilize her," choosing instead to shoot and kill it. When Mr. Vieira appeared on his balcony as the Officers shot the first of his

dogs, "[h]e was instructed to stay where he was." Had the Officers followed their usual practice, they would have allowed the caretaker and the owner to control the dogs. The Officers' only explanation for not doing so -- "maintain[ing] the element of surprise" – is utterly specious when one considers the noise made by a rifle shot.

2. Using The Pepper Spray The Officers Carry

San Jose Officers were quick to point out that there are other non-lethal means of dealing with belligerent dogs as well, including the use of pepper spray. Officer Nieves, who shot the Vieiras' dogs, admitted that he had pepper spray with him on January 21, 1998. He provided no explanation for not using it.

3. Chasing The Dog Away Or Into An Enclosure

San Jose Officers also testified that they have dealt with dogs they encountered in the past by shouting at them or chasing them away, or into some enclosure. No explanation was offered as to why this non-lethal option was not planned for or utilized in this case.

4. Utilizing An Animal Control Officer

Finally, Officers pointed out that one of the non-lethal options available to them is to call upon a humane officer or someone else trained to immobilize dogs. Officer Decena testified that the Officers did not think of doing so in this case until after the dogs were killed.

ARGUMENT

Petitioners do not contend that the Ninth Circuit's decision conflicts with a decision from another Circuit. Nor do they contend that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rather, Petitioners assert that the Ninth Circuit misapplied a properly stated rule of the law. Specifically, Petitioners argue that the Ninth Circuit relied on an impermissibly broad and general statement of "clearly established" law, a prong of the qualified immunity analysis. In fact, it is Petitioners who seek to draw distinctions between this case and firmly established precedent that are far too fine. A reasonable officer in Linderman's and the San Jose Officers' positions would have known that his conduct violated Respondents' Fourth Amendment rights.

I. Sergeant Linderman Violated Respondents' Clearly Established Fourth Amendment Rights

A. The Scope of the Warrants

Long before January 20-21, 1998, when Linderman obtained the warrants and directed the searches at issue here, it was understood that the Fourth Amendment proscribes searches and seizures that exceed a warrant's scope. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 17-19 (1968) ("This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.") (citing *Kremen v. United States*, 353 U.S. 346 (1957); *United States v. Di Re*, 332 U.S. 581, 586-87 (1948); *Go-Bart Importing Co. v. United States*,

282 U.S. 344, 356-58 (1931)); *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982); *United States v. Penn*, 647 F.2d 876, 882 n.7 (9th Cir. 1990); *VonderAhe v. Howland*, 508 F.2d 364, 369-70 (9th Cir. 1975).

"In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1979); *see also Terry*, 392 U.S. at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."); *VonderAhe*, 508 F.2d at 369 ("What is 'overly broad' cannot be resolved in an abstract or academic manner but only in relation to the facts, circumstances under, and the purpose for, which the warrants were issued."). The reviewing court must also scrutinize the particular purpose of a search when considering whether it was necessary to damage property during the search's execution. *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) ("[B]ecause the touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose."); *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994) ("Among the issues that must be resolved at trial are not only the extent of physical force and intrusive measures employed during the search, but whether such measures were justified by the purposes of the search."), *abrogated on other grounds by Wilson v. Layne*, 526 U.S. 603 (1999); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 804 (1994) ("Greater intrusiveness requires greater justification.").

Sergeant Linderman sought "any evidence of membership in [sic] affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to 'Hells Angels'" to prove the sentencing enhancement codified in California Penal Code section 186.22, which was alleged against a third party. California Penal Code section 186.22(b) provides that a defendant is eligible for a three-year sentence enhancement when the prosecution proves that the defendant committed the crime of conviction "for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members." Cal. Pen. Code § 186.22(b). Section 186.22(b)(1) specifies that the provision has three separate elements: (1) the existence of a "criminal street gang"; (2) a conviction for a felony committed for the benefit of, at the direction of, or in association with that gang; and (3) that the crime of conviction was committed with the specific intent to promote, further, or assist in criminal conduct by gang members.

Proof of the first element, the existence of a "criminal street gang," itself requires proof of three separate elements: (1) an ongoing organization, association or group of three or more persons, whether formal or informal, which has a common name or common identifying sign or symbol; (2) having as one of its "primary activities" the commission of one or more of the predicate offenses specified in section 186.22(e); and (3) whose members individually or collectively engage in a "pattern of criminal gang activity." Cal. Pen. Code § 186.22(f); *see also People v. Louen*, 17 Cal. 4th 1, 18 (1997). In its Order of July 13, 2001, the district court rejected Plaintiffs' challenge to the legality of the searches for Hells Angels indicia, finding that Defendants had probable cause to search because such evidence would have helped to make out the first of the three elements of the "criminal street gang" sentencing enhancement, that the

Hells Angels is an ongoing organization of three or more which has a common name or common identifying sign or symbol. (Plaintiffs/Respondents have reserved their right to appeal this order.)

To prove this first element of the sentencing enhancement, one need only look at the substantial admissible evidence in the public domain, including Respondents' website and United States Patent & Trademark Office filings. In Mr. Tausan's case, the prosecution proved it by calling San Jose Police Officer Jorge Gil Blanco as an "expert" on the Hells Angels. Officer Gil Blanco, who had been surveilling San Jose Charter members and their associates for more than eight years without ever making an arrest, showed the jury generic pictures of Hells Angels and public displays of their trademarked name to establish that the group has a common name, identifying sign or symbol. None of the property seized from Respondents was used to prove anything at all.

B. The Inadequacy Of Linderman's Case For Exceeding the Scope of the Warrants

Petitioner Linderman avoids discussing the necessity for seizing "truckloads" of Respondents' property, instead arguing that he was "commanded" to do so by the language of the warrant. This is nonsense.

The warrants call for "any" Hells Angels indicia to prove California Penal Code section "186.22". Identical language is used in Linderman's Affidavit in support of the warrants. Linderman admitted at his deposition that he knew the reference was to section 186.22(b), the sentencing enhancement, which had been charged against a third party. He knew that the evidence was relevant merely to prove that

the Hells Angels is an ongoing organization of three or more having a common name or common identifying sign or symbol.

The first definition of "any" in Merriam Webster's Collegiate Dictionary is "one or some indiscriminately of whatever kind." This is consistent with the way in which a reasonable officer in Sergeant Linderman's position would have interpreted the term, particularly when he learned how much "indicia" there was, and that Respondents' property would be damaged and/or destroyed if the officers were to seize it all. *See Andersen v. Maryland*, 427 U.S. 463, 480 (1976)(law enforcement officers must read ambiguous phrases in warrants to only authorize the search for and seizure of evidence related to the purpose for which the warrant was obtained).

Linderman, in contrast, chose to act unreasonably, and now asks the Court to find that he had no choice because the *third* definition of "any" in Merriam Webster's is "all." While this argument might work for a search team member who had not read the affidavit in support of the warrants and did not know the limited purpose for which the evidence was sought, it does not work for Linderman. Linderman did not just read the affidavit, *he wrote it. See Groh v. Ramirez*, 540 U.S. 551, 561-564 (2004) (officer who wrote the warrant affidavit and warrant forms could not escape liability by blaming the authorizing magistrate). He knew the limited purpose for which the evidence was sought. In directing the searchers to go beyond what was necessary to fulfill this purpose, he violated Respondents' Fourth Amendment rights.

Dissenting Judge Bea argues that the majority "minimizes the importance of the searches." Linderman's

App. 34 n.1. Judge Bea points out that the warrants refer to "felonies" and California "Penal Code 186.22," without specifying the subsection. *Id.* Subsection 186.22(a) makes it a felony to actively participate in a criminal street gang. Subsection 186.22(b) is the sentencing enhancement. But all this is beside the point. Linderman knew that the evidence was pertinent only to the sentencing enhancement. His affidavit in support of the warrants did not even attempt to establish probable cause as to the crime. The Complaint filed against Steve Tausan prior to the searches alleged the sentencing enhancement and not the crime. Linderman confirmed that he was going for the "enhancement" and not the crime during his sworn deposition. Thus, while it might be theoretically possible for an officer to believe, based on the warrant, that he was searching for evidence of a crime, Linderman could not have and did not believe this.

Respondents heartily agree with Judge Bea that the warrants might be overbroad. But that hardly absolves Linderman, who was responsible for drafting, obtaining and serving them. He had actual knowledge of the limited purpose for which the evidence was sought, actual knowledge that the officers conducting the searches had found more than enough, and he nevertheless gave the order: "Take everything."

Linderman's attempt to twist the Fourth Amendment's particularity requirement into a mandate that officers act more intrusively than necessary is wholly unpersuasive. The purpose of the particularity requirement is to prevent general searches and to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. at 561. Neither of these purposes would be served by requiring officers to seize everything conceivably included within a warrant's coverage, even when it is unnecessary

to fulfill the purpose for which the evidence was sought. To impose such a requirement would be to create a "new rule," not the reverse. As the Ninth Circuit had found in a case decided 12 years before Linderman issued the order to "take everything" in this case, "[t]he fact that the officers did not seize all of the materials permitted by the warrant does not mean that they possessed the type of unfettered discretion that violates the fourth amendment." *United States v. Hayes*, 794 F.2d 1348, 1356 (9th Cir. 1986), *cert. denied*, *Hayes v. U.S.*, 479 U.S. 1086 (1987).

Finally, it is Linderman and not the Ninth Circuit whose interpretation of the law is "unworkable" in practice. No reasonable officer would believe that a trial judge would permit the prosecution to introduce into evidence 115 patches, 65 wall plaques, a Pepsi machine, a refrigerator, a Bud Lite pool table light, a safe, a cash register, a display case with a Death's Head sticker on it, a mail box, a street sign, nine cardboard boxes full of t-shirts, a door, posters, road signs, paintings, magazines and a concrete slab – and that's just what was seized from the clubhouse – plus a dozen Harley Davidson motorcycles and scores of items similar to those listed above that were seized from Respondents' homes. The Ninth Circuit has not created a "new rule" requiring officers to make nuanced tactical distinctions best left to an attorney, as Linderman argues. Linderman has been held accountable for failing to apply the judgment and common sense that the Fourth Amendment requires any reasonable officer entrusted with executing a search warrant to apply.

Linderman's motion for summary judgment based on qualified immunity was properly denied.

II. Officers Decena, Newman, Manion, Knox, Carney, Messier, and Nieves Violated Respondents' Clearly Established Fourth Amendment Rights

It was well established at the time the Officers shot Respondents' dogs that the shooting of a dog by a police officer is a seizure for Fourth Amendment purposes and is thus subject to the "reasonableness" test. The Officers had a week to plan the execution of the search warrants in this case. San Jose had a policy and practice of avoiding shooting dogs if at all possible, and these officers had managed to avoid shooting dogs in other cases. Yet they made no realistic plan other than to shoot Respondents' dogs. Their conduct was, as Judge Bea aptly put it, "outrageous." "Clearly, a reasonable officer [in these Officers' position] would have understood that his actions violated an established right of the plaintiffs." The Officers' App. 31 (Bea, concurring).

The Officers' effort to distinguish the numerous cases confirming this principle by arguing that none of them involved the shooting of a dog *while executing a warrant* is specious. If anything, the cases, which involved the shooting of dogs encountered by officers while on patrol or on an emergency call, highlight the unreasonableness of the Officers' conduct in this case. There were no exigent circumstances here. These officers were not faced with a split second decision. They had *a week* to plan for their encounter with the dogs. If officers responding on a moment's notice are required to act reasonably, these Officers certainly were.

The Officers' motion for summary judgment based on qualified immunity was properly denied.

CONCLUSION

The lower courts acted properly in denying Petitioners' motions for summary judgment based on qualified immunity. Petitioners' conduct was unreasonable and it would have been clear to an officer in these officers' positions that it was unreasonable. This Court should deny Linderman's and the San Jose Officers' Petitions for Writs of Certiorari.

Respectfully submitted,

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